

Fairness and Mediation

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I. INTRODUCTION

Any proposed uniform mediation statute must address multiple concerns.² This Article focuses on only one target: the distinctive ways in which a uniform statute can shape the nature and practice of mediation to ensure that its use comports with our considered notions of fairness.³

This analysis requires two primary features. First, there must be an operative conception of fairness against which to assess whether mediation policies and practices embedded in a uniform statute support or transgress it. Second, the central statutory provisions governing the design and use of mediation must be identified, and the manner in which they advance or undermine fairness considerations must be explicated. From such an analysis,

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² I will not address in this Article such matters as the way in which a uniform statute could impact considerations of efficiency, costs to parties or "access to justice" concerns. This Article is part of a longer work in progress by the author addressing the relationship between the fundamental principles of a democratic society and methods and tactics by which people and groups define and resolve differences.

³ To state that I focus on "only one" target should not diminish the significance of this topic. Fundamentally, we are examining the following consideration: If persons in our community use mediation (routinely, systematically or exclusively), should we be concerned that they might be participating in a process that is arbitrary, capricious or in other ways inconsistent with our fundamental notions of due process such that we would not want them, as a matter of public policy, to participate in it? In the vernacular, will persons "get screwed or gypped" if they participate in mediation? Further, this Article analyzes the concept of fairness in mediation. But such an analysis presumes that fairness is an important value to be secured. That proposition—that a dispute settlement system should give priority to embracing or promoting considerations of fairness over such values as predictability of outcome, uniformity of outcomes or efficiency of process—of course, must be justified, not simply asserted. That argument, though, requires a different level of analysis and is not addressed here.

one can then propose statutory language that most effectively secures fairness concerns.

A suitably framed conception of fairness bears straightforward consequences for how a proposed uniform mediation statute should address three central statutory topics: (1) a purpose clause; (2) a theory of bargaining; and (3) a conception of the mediation process. The result would, on grounds of fairness, affirmatively delete certain types of statutory provisions or court rules that have gained a foothold in selected state jurisdictions.

II. A CONCEPTION OF FAIRNESS⁴

One must crystallize a sufficiently rich conception of fairness in order to assess how particular statutory features advance or undermine its principles. Doing that, of course, is a daunting, complex task;⁵ its complexity, however, cannot paralyze us from positing the parameters of such a conception so that we can proceed to the remaining tasks. The parameters include three elements: a jurisprudential framework, distributional substantive principles and procedural protections.

A. *Jurisprudential Framework*

This article starts by embracing the following jurisprudential point: the meaning of fairness is not exhausted by the concept of "legal justice."⁶ If the

⁴ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134–137 (1977). Dworkin distinguishes a concept as compared to the particular "conceptions" that one may have. What is set forth above is clearly a conception within Dworkin's framework of analysis.

⁵ Such an enterprise has commanded the talents and energies of many outstanding individuals. Philosophers alone would include such 19th century intellectual giants as Jeremy Bentham and John Stuart Mill; in our own century, the efforts of John Rawls, Alan Gewirth and David Gauthier reflect the breadth and depth of conscientious efforts to develop a comprehensive analysis of this fundamental concept.

⁶ That is, I take the following locution to be perfectly plausible: "You are legally entitled to X but that result does not produce a fair outcome." An example would be the following: You are legally entitled to recoup rent arrears from your tenant, but you are extraordinarily rich and your tenant is a single parent of three young children without adequate resources to provide subsistence food and clothing articles. In no meaningful sense would you be harmed if the arrears were not paid. Hence, compelling her to pay rent arrears, even if that meant that she would have to take the money from what is already a mere subsistence food and clothing allowance and leave her children further destitute, as well as possibly being evicted from the premises, might be a legally defensible result but not a fair one.

primary objective for using mediation was to ensure that litigants have their legal claims heard and results established in a more expeditious, informal, nonadversarial atmosphere than would otherwise be obtained by using a traditional litigation process, all that one could say with confidence about such a use of mediation is that the parties secured at least what they were legally entitled to, *whether that outcome was fair or not*.⁷

This dimension of legal positivism bears the following implication for the uniform mediation statute: If a primary goal of the uniform mediation statute is to promote or secure fairness, then its stated objectives cannot be *simply* or *exclusively* to ensure that participants in a mediation process achieve what they might or would have secured in an adjudicatory legal proceeding. The challenge is much more daunting.⁸

What, then, are the necessary components of a concept of fairness against which to assess whether statutory provisions secure their vitality? There are two required dimensions: a substantive aspect and a procedural element. Each will be considered in turn. Although this Article shall indicate briefly in this Part how a statutory provision or mediation practice can advance or undermine these fairness considerations, it reserves for Part III the more detailed analysis of how proposed statutory provisions affect these conceptual principles.

B. Substantive Dimensions of Fairness

The uniform statute's conception of fairness must embrace a principle that constitutes the functional equivalent of the difference principle in Rawls' scheme.⁹ Stated at a very general level, we would criticize the mediation process as being "unfair" if outcomes achieved through it left some parties much worse off from their starting position than they would have been had they participated in any other dispute resolution process. For example, in a

⁷ The practical impact of this feature, to be discussed in more detail below, is straightforward: A mediator who adopts what has been referred to as an evaluative orientation may be criticized on the ground that his orientation frustrates rather than advances fair settlement terms.

⁸ To some, though, that "daunting task" is also the great promise of mediation suitably conceived and executed. See ROBERT A. BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994); Kimberlee K. Kovach & Lela P. Love, "*Evaluative*" Mediation Is An Oxymoron, 14 *ALTERNATIVES TO HIGH COST LITIG.* 31, 31 (1996) (responding to Riskin grid article).

⁹ See JOHN RAWLS, *A THEORY OF JUSTICE* 75-83 (1971).

mediation focusing on a marital dissolution, if the husband were deliriously happy with the substantive settlement terms he negotiated because they required minimal financial and parenting obligations while the wife was simply very unhappy with the outcome, we would criticize the outcome on the grounds that the mediation process had allowed or promoted an unfair outcome to be obtained,¹⁰ even if according to a utilitarian calculus it was demonstrated that the overall balance resulting from the combination of the husband's being deliriously happy and the wife's being very unhappy promoted an increased *gain* in the couple's utility function. In this important sense, the idea that a concept of fairness must include a substantive distributional dimension that trumps utility considerations appears persuasive and central.¹¹

C. Procedural Dimensions of Fairness

The second, related dimension of a conception of fairness focuses on procedure. Broadly speaking, principles of fairness must govern the manner in which one conducts mediated conversations. These principles need not replicate the due process procedural rules ingredient to a trial; however, they must shape mediated conversations with sufficient focus and precision so that one party does not have his or her sense of integrity, or self, systematically undermined simply by virtue of the way in which the mediator interacted with the parties or facilitated interaction among them. Examples of elementary procedural requirements abound. If it were thought that a mediator were justified in permitting one party's advocate to insult or castigate his counterpart's client, thereby resulting in the collapse of that party's self-esteem, we would criticize the mediation process for either permitting (or affirmatively promoting) the violation of a party's right to be

¹⁰ The assumption, well grounded in the literature, is that mediation is a form of assisted negotiations. Hence, the outcome described here is more accurately portrayed as a negotiated outcome secured in the context of a mediator conducting a mediation conference.

¹¹ There are obvious complications with positing this difference principle. A primary concern is how one, in the real world, establishes the starting position against which to assess whether the produced outcome is better or worse. But its function is what provides such a powerful foundation for criticizing the types of outcomes identified in the example. This aspect of the principle is central to constraining the adverse impact of discriminatory attitudes based on race, religion, gender, age and other immutable characteristics from being given free reign in mediation or other dispute resolution processes that we hope would command the allegiance of a community.

treated with dignity and respect.¹² The basis of our criticism would not be the obvious pragmatic, psychological observations that allowing or promoting such insulting or abusive behavior predictably polarizes parties, freezes them into non-negotiable postures and quickly forecloses collaborative discussions and the possibility of generating acceptable settlement arrangements. Rather, our criticism would be predicated on the more fundamental concern regarding fairness principles; allowing such behavior violates one party's right to be treated as an equal.¹³

Statutory provisions and practitioner rhetoric sometime suggest that these procedural dimensions are not important. Mediation is frequently characterized in statutes as an informal process.¹⁴ Rhetoric¹⁵ frequently

¹² See RONALD DWORKIN, "REVERSE DISCRIMINATION," *TAKING RIGHTS SERIOUSLY* 223-239 (1977).

¹³ See *id.* at 227. While this principle finds its conceptual home in a theory of equality rather than one of fairness, presumptively a process that generated agreements because one person with a diminished (fundamental) sense of self-esteem "caved in," would not be viewed as a "fair" process.

¹⁴ See CAL. CIV. CODE § 850(c) (West Supp. 1998) ("Mediation means an informal process in which the disputing parties select a neutral third party to assist them in reaching a negotiated settlement in which the neutral third party has no power to impose a solution on the parties, but rather has the power only to assist the parties in shaping solutions to meet their interests and objectives."); CAL. EDUC. CODE § 56500.3(a) (West Supp. 1998): ("It is also the intent of the Legislature that these voluntary prehearing request mediation conferences be an informal process conducted in a nonadversarial atmosphere to resolve issues relating to the identification, assessment, or educational placement of the child, or the provision of a free, appropriate public education to the child, to the satisfaction of both parties."); FLA. STAT. ANN. § 44.1011(2) (West 1994) ("'Mediation' means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement."); 710 ILL. COMP. STAT. 20/1 (West 1992) ("The General Assembly finds that the resolution of certain disputes can be costly and time-consuming in the context of a formal judicial proceeding; and that mediation of disputes has a great potential for efficiently reducing the volume of matters which burden the court system in this State; and that unresolved disputes which individually may be of small social or economic magnitude are collectively of enormous social and economic consequence; and that many seemingly minor conflicts between individuals may escalate into major social problems unless resolved early in an atmosphere in which the disputants can discuss their differences through an informal yet structured process . . ."); MICH. COMP. LAWS § 330.1772(f) (1996) ("'Mediation' means a private, informal dispute resolution process in which an impartial, neutral individual, in a confidential setting, assists parties in reaching their own settlement of issues in a dispute and has no authoritative

interprets a dimension of informality to be that traditional rules of evidence governing document introduction or witness testimony do not apply in mediation or that the privacy of the conversation licenses people to say whatever they want to say if the party deems it relevant to the development of possible settlement terms. But standard mediator practice reveals a more consistent, formal practice regulating participant interaction than the image of informality suggests, and such practices are justified by considerations of fairness.¹⁶

Mediators, for instance, routinely begin their service by establishing a sound, conventional framework for handling pre-meeting conversations with parties or their representatives or for structuring the exchange of pre-mediation briefs or other information; these procedures are designed to be balanced so that no one party has an initial advantage in the conversation. Mediators start mediation conferences by explaining the mediation process and the mediator's role, thereby establishing appropriate party expectations regarding the decisionmaking environment and their respective roles in it. They set forth guidelines by which the conversation will be conducted,

decisionmaking power."); N.C. GEN. STAT. § 7A-38.1(b)(2) (1995) ("Mediation" means an informal process conducted by a mediator with the objective of helping parties voluntarily settle their dispute."); OKLA. STAT. tit. 12, § 1805 (D) (1993) ("Each mediation session shall be informal."); S.C. CODE ANN. § 8-17-320(14) (Law Co-op. 1996) ("Mediation means an alternative dispute resolution process whereby a mediator who is an impartial third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. The process is informal and nonadversarial with the objective of helping the disputing parties reach a mutually acceptable agreement.").

¹⁵ See LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 4 (1987); *ABCs of ADR: A Dispute Resolution Glossary*, 10 *ALTERNATIVES TO HIGH COST LITIG.* 115-118 (1992); Gerald S. Clay & James K. Hoenig, *The Complete Guide to Creative Mediation*, *DISP. RESOL. J.*, Spring 1997, at 8, 8-9 ("While virtually every other dispute resolution process cedes all or part of the power to determine outcome to a third party, mediation is an informal, voluntary, loosely structured process in which the mediator facilitates communication, encourages exchange of information and ideas, tests the reality of parties' perceptions and ideas, advises, suggests, translates what is said to detoxify the emotional climate, and at times recommends and persuades, all in the service of assisting the parties to reach their own agreement."); Walter G. Gans, *Saving Time and Money in Cross-Border Commercial Disputes*, *DISP. RESOL. J.*, Jan. 1997, at 50; Julie M. Tamminen, *Using Alternative Dispute Resolution to Handle Client Disputes*, 11 *ME. B.J.* 213, 213 (1996) ("Mediation: An informal, voluntary process used frequently in ongoing relationship[s], such as family, neighborhood or community.").

¹⁶ See generally JOSEPH B. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* (1987).

including the speaking order, the manner in which parties and advocates are expected to address one another, and the like. The compelling justification for these guidelines is to ensure fair treatment among the participants, irrespective of whether a settlement is reached.¹⁷

But the issues and concerns surrounding how to ensure procedural fairness in mediation conferences quickly become more complex and subtle; statutory provisions must be attuned to these nuances if fairness is to be secured. One prominent instance relates to diversity. Being sensitive to how differences in conversational styles between women and men¹⁸ or between persons of different ethnic backgrounds¹⁹ are permitted to play out in a mediated conversation is an important indicator of fairness. If the mediator (or mediation process) requires persons to talk in a certain way—for example, by presenting legal arguments, by using only “proper” or conventional language or by being allowed to talk only to the mediator—arguably that imposed conversational lens might instantly straightjacket one party and place it at an unfair disadvantage.

Given these very broad parameters regarding substantive and procedural

¹⁷ There may not be an established body of knowledge that provides doctrinal answers to some procedural issues for mediators. For instance, there is no rule analogous to the doctrine of “standing to sue” or a “ripeness” requirement that informs decisions regarding who is a “party” to the mediation conference or when the mediation is most appropriately conducted. That absence of doctrine, however, does not operate to undermine the capacity of the mediation process to promote a more robust vision of procedural fairness than might otherwise issue from such established doctrines. For instance, a mediator and the parties might deem the participation of grandparents in a marital dissolution mediation as critical to an informed dialogue, even if those persons are not parties to the lawsuit.

¹⁸ See generally DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: MEN AND WOMEN IN CONVERSATION* (1990).

¹⁹ See generally CALIFORNIA ASSOCIATION FOR BILINGUAL EDUCATION, *RECLAIMING OUR VOICES: BILINGUAL EDUCATION CRITICAL PEDAGOGY AND PRAXIS* (Jean Frederickson ed., 1996); ANITA DE FRANZ, *COMING TO CULTURAL AND LINGUISTIC AWAKENING: AN AFRICAN AND AFRICAN AMERICAN EDUCATIONAL VISION* (1994); EDWARD T. HALL, *THE SILENT LANGUAGE* (1959); KARLA HOLLOWAY, *CODES OF CONDUCT: RACE, ETHICS, AND THE COLOR OF OUR CHARACTER* (1995); PAUL SIEGEL, *OUTSIDERS LOOKING IN: A COMMUNICATION PERSPECTIVE ON THE HILL/THOMAS HEARINGS* (1996); *THE LYNCHING OF LANGUAGE: GENDER, POLITICS, AND POWER IN THE HILL THOMAS HEARINGS* (Saundra L. Ragan et al. eds., 1996); ROBERT LEWIS WILLIAMS, *EBONICS: THE TRUE LANGUAGE OF BLACK FOLKS* (1975); Rene Sanchez, *Ebonics Debate Comes to Capitol Hill*, WASH. POST, Jan. 24, 1997, at A15; Elaine Woo & Mary Curtius, *Oakland School District Recognizes Black English*, L.A. TIMES, Dec. 20, 1996, at A1.

fairness, how might a uniform statute advance or undermine their integrity?

III. STATUTORY ELEMENTS ADDRESSING CONSIDERATIONS OF FAIRNESS

This Article will address three elements surrounding the use of mediation that any statute must explicitly or implicitly address. These are (1) a purposes clause, (2) an operative conception of bargaining and (3) a governing vision of the mediation process.

A. *Purposes*

A statement of purpose can guide human conduct, even if it cannot anticipate every configuration or interaction that it is, in principle, designed to shape, guide or regulate.²⁰ But a statute can identify multiple types of purposes, some of which might be substantive outcomes while others are procedural goals. Current mediation statutes addressed to multiple contexts embrace each kind. The following provisions are illustrative; their significance for fairness is considered thereafter.

1. Substantive Outcomes

a. Family

[T]he purpose of the mediation proceeding is to reduce acrimony . . . and to develop an agreement *assuring the child's close and continuing contact with both parents after the marriage is dissolved*²¹

b. Victim Offender

[T]he Legislature hereby finds and declares:

(a) Over the last 10 years, criminal case filings, including misdemeanor filings, have been increasing faster than any other type of filing in California's courts. Between 1981 and 1991, nontraffic misdemeanor and infraction filings in municipal and justice courts increased by 35 percent.

(b) [M]any of these cases are ill-suited to complete resolution through

²⁰ See generally H.L.A. HART, THE CONCEPT OF LAW (1961).

²¹ MINN. STAT. § 518.619 (1990) (custody or visitation; mediation services) (emphasis added).

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the criminal justice system *because they involve underlying disputes which may result in continuing conflict and criminal conduct within the community*

(c) By utilizing [mediation] processes, these program also provide an opportunity for direct participation by the victims of the conduct, *thereby increasing victims' satisfaction with the criminal justice process*.²²

c. Community Dispute Resolution

Foster the development of community-based programs that will assist citizens in resolving disputes and *developing skills in conflict resolution*.²³

d. Employment Relations

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining. . . .²⁴

[A] sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of the employers and employees can most satisfactorily be secured by the settlement of issues . . . through the processes of conference and collective bargaining [T]he settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for . . . *mediation* . . . to aid and encourage employers and the representatives of their employees . . . *to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining*²⁵

²² CAL. PENAL CODE § 14150 (West 1992) (emphasis added).

²³ OR. REV. STAT. § 36.105 (1996) (emphasis added).

²⁴ National Labor Relations Act § 1, 29 U.S.C. §§ 151-169 (1982) (Findings and Policies).

²⁵ Labor Management Relations Act § 201, 29 U.S.C. §§ 141-197 (1982) (emphasis added).

2. Procedural Outcomes

a. Civil Court Mediation

It is estimated that the average cost to court for processing a civil case is \$3,943 for each judge day The judicial council *shall deem [mediation] successful if it results in estimated savings of at least \$250,000 to the courts and corresponding savings to the parties*. Alternative processes for reducing the cost, time, and stress of dispute resolution, such as mediation, have been effectively used in California and elsewhere. In appropriate cases *mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their dispute and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system*²⁶

b. Consumer Affairs

[T]he Legislature hereby finds and declares all of the following: [t]he resolution of many disputes can be unnecessarily costly, time-consuming, and complex when achieved through formal court proceedings where the parties are adversaries and are subjected to formalized procedures. To achieve more effective and efficient dispute resolution in a complex society, greater use of . . . mediation . . . should be encouraged.²⁷

c. Trademark

[T]he U.S. District Court for the Northern District of Illinois recently established a voluntary mediation program for cases arising from trademark disputes in an effort to reduce litigation costs and resolve disputes faster.²⁸

d. Misdemeanors

Many victims of misdemeanor criminal conduct feel excluded from the criminal justice process. Although they were the direct victims of the offender's criminal conduct, *the process does not currently provide them with a direct role in holding the offender accountable for this conduct*²⁹

²⁶ CAL. CIV. PROC. CODE § 1775 (West Supp. 1993) (emphasis added).

²⁷ CAL. BUS. & PROF. CODE § 465 (West 1990).

²⁸ *Illinois Court Starts Mediation Program*, DISP. RESOL. J., Spring 1997, at 5, 5.

²⁹ CAL. PENAL CODE § 14150 (West 1992) (emphasis added).

3. *Significance*

The significance that these statements of statutory purpose carry for considerations of fairness is readily apparent. They will be considered *seriatim*.

a. Substantive Outcomes

At the substantive level, two competing approaches are illustrated. One approach attempts to secure specific rights or outcomes for one or more of the parties to the process; the alternative features a commitment to a process of dispute resolution that bears implications for assessing both the starting positions and permissible outcomes for the parties but does not stipulate or require particular terms of resolution. Fairness principles are undermined by the former provisions but secured by the latter.

The provisions noted above governing both the family and victim offender mediation assert straightforwardly a substantive outcome that parties must promote or with which they must comply. The goal of each statute is to ensure that certain rights of particular parties are vindicated. Thus, a mediated outcome in Minnesota that did not “assure the child’s close and continuing contact with both parents after the marriage is dissolved”³⁰ would violate the public policy articulated in the statutory framework. Arguably, though, a different arrangement from that required by the statute might promote a more fair outcome.

For example, the parties and the affected individuals (e.g., children, grandparents or extended family members) might stipulate the following: (1) the children would have either no or only limited contact with one parent following the divorce but they would spend time with closely regarded grandparents or extended family members; and (2) financial resources would be allocated to maximize and sustain this contact as well as provide for other educational opportunities for the adults and children. Hypothetically, such an arrangement might be preferred by the parties and the affected individuals and be endorsed by impartial experts in family development and dynamics as one that promotes the best interests of the children as well as each parent and other affected adults. Hence, in every significant way, it constitutes an arrangement that would place the parties in a substantially better position than either their current situation provides or that required by the mandated statutory purpose. Thus, complying with the stated statutory purpose would

³⁰ MINN. STAT. § 518.619 (1990).

have undermined fairness.

More sharply, though, one can also envision how the required mediated outcome could force a change in the parties' current circumstances that leaves one or more participants notably worse off. In that situation, the mediation process would have been a partner in affirmatively facilitating legal but unfair outcomes.

A similar result holds for each of the other statutory provisions in which an explicit component of the purpose of the mediation process is to promote or secure identifiable rights or outcomes. For example, any person conducting a community mediation conference under Oregon's Community Dispute Resolution Act³¹ who helps generate a resolution that does not result in tangibly improving the parties' capacity to resolve future disputes has failed to do the work required by the statute. Further, arguably, the statute prohibits the parties from agreeing to refrain from future contact with one another, for such an arrangement does not improve their conflict resolution skills so much as to structure for them an environment in which neither will have to use their conflict resolution skills with one another.

Victim offender mediation promotes discussions between the victim and offender over elements of restitution. As a precondition for participating in Victim Offender Restitution Programs (VORP), a defendant typically must acknowledge responsibility for the commission of a criminal act. Conversations in mediation that are related to the interpersonal dynamics that might have led to the proscribed criminal action are not encouraged.³² Hypothetically, if the victim, in some significant way, provoked the defendant to commit the assault and battery by having made a remark or casting a glance that was racially offensive or gender insensitive, discussion of that provocative incident will not arise because addressing matters that are

³¹ See *supra* note 23 and accompanying text.

³² Hypothetical: A Caucasian female, walking down a busy downtown shopping sidewalk, observes three African American youths walking on the sidewalk in the opposite direction toward her. She immediately backs up against the wall of stores, and, while nervously maintaining eye contact with the approaching youths, begins taking off her bracelet and earrings and hastily stuffing them into her purse. The youths, according to their account, are so offended by the perception that "black males will rob," that they immediately surround her and take her purse. The woman screams, and a nearby police officer arrests the one youth who is holding the handbag. It is a first offense for the youth and the matter is referred to victim offender mediation. The literature suggests that the only topic of conversation should be for the youth to apologize to the adult and agree to perform appropriate restitution projects. The underlying concern of the youth being stereotyped in racist terms goes unmentioned.

likely to reduce victim satisfaction with the criminal justice system undermines the prescribed statutory purpose. Fairness, of course, would dictate different starting points.

This tension between statutory purposes and fairness principles changes dramatically by adopting the approach to a purpose clause that is so distinctive about the National Labor Relations Act.³³ That approach identifies a broad social goal to be promoted (eliminating the causes of certain substantial obstructions to the free flow of commerce) but explicitly refrains from identifying one particular substantive outcome or set of outcomes as being necessary and sufficient conditions for eliminating those obstructions, or even as some being preferable to others. Affirmatively, the statute endorses a procedure—collective bargaining (and, later, its supportive services)—as the preferred method for promoting its overall purpose. And it rests its faith on the participants in that process and in the values which are constitutive of it to generate outcomes that advance its commanding vision of an employment relationship that serves the interests of the nation.

Of course, there must be some operative notion of collective bargaining guiding the framer's use of the term, and there is. It is a vision of two groups, vigorously representing sometimes competing but oftentimes dovetailing interests, meeting to "hammer out" settlement terms. There is an operative presumption of an employer's or union's right to be treated with dignity and respect by their respective counterparts, a respect for the capacity of each party to identify its respective concerns and priorities and a confidence that the dialogue process will enable the parties to secure their substantive interests in a manner compatible with the community's interest. That vision of the elements of a dispute resolution system is breathtaking in its confidence in the democratic process and spirit. It offers a robust vision of the possibility of developing fair outcomes and targets particular ways for ensuring threshold starting positions of dignity and strength.

b. Procedural Outcomes

Statutes that stipulate process goals can also adopt one of two approaches: They can prescribe goals or benchmarks against which to evaluate mediation's cash value, or they can set forth procedural guidelines by which the mediation process is to be conducted.

³³ See 29 U.S.C. §§ 151–169 (1994).

i. Efficiency Goals

Conflicts between claims of efficiency and fairness are easy to construct. Mediation practitioners report subtle and not so subtle pressures to conduct mediation conferences promptly, expeditiously and successfully (i.e., the parties settle) in order to be perceived by various referring judicial personnel as effective. California stipulates that using mediation for civil cases should result in an overall savings of at least \$250,000 to the parties and courts.³⁴ These efficiency goals will, or should, influence the manner in which the mediation session is conducted. It could, hypothetically, lead a mediator to restrict the number of participants in the mediation conference in order to minimize the costs of conversation. Such an approach clearly can be seen to shape and, arguably, distort the discussion process in a way that undermines fairness considerations. Multi-party cases, for instance, involving alleged violations of constitutional rights might be conducted in such a manner as to prematurely restrict participation and needlessly restrict ranges of dialogue and outcomes,³⁵ all in the name of "keeping focused." Efforts to present information to a mediator in a concise, focused way (i.e., efficient) militates in favor of having legal counsel, not the parties, control presentation and exchange of information, arguments and proposals. The repeat player in mediation who has seen many cases like the instant one and knows where it will settle, if at all, drives the process to reward efficient administrative processing and disposition of cases. But celebrating impatience when a lack of imagination is the culprit puts fairness and efficiency in conflict.

ii. Values in Process Goals

The second, competing approach adopted in the process category involves statutory provisions that secure fundamental features of a fair process. These provisions value having those persons directly affected by the incidents and their outcome participate in the process of resolving it. Again, requiring this can operate at cross purposes with efficiency. Conducting a conversation between a victim of crime and the perpetrator might consume a considerable period of time compared with a prompt trial, or, perhaps

³⁴ See CAL. CIV. PROC. CODE § 1775 (West Supp. 1993).

³⁵ Lela P. Love & Cheryl B. McDonald, *A Tale of Two Cities: Day Labor and Conflict Resolution for Communities in Crises*, DISP. RESOL. J., Fall 1997, at 8-10. Love and McDonald describe how Glen Cove, N.Y. and Agoura Hills, CA addressed disputes of this nature.

preferred, a plea bargain arrangement that disposes of the matter. In civil cases, mandating the participation of those with authority to make settlement decisions might require the attendance of the company's chief executive officer,³⁶ thereby imposing a cost on the process that could make it prohibitive or cumbersome. Mandating or encouraging plea-bargaining-type processes or settlement discussions involving only party representatives with a mediator might expedite the disposition of the legal claims (or a settlement that pivots around the respective assessment of the strengths and weaknesses of the legal claims), but they are contrary to the legislative prescription that engaged participation by parties to the controversy holds the best hope for developing multiple options for the respective outcomes of all parties, i.e., advancing fairness.

This discussion suggests that a statutory purpose clause, to secure fairness, must target two components. It must firmly posit a fundamental dispute resolution process (mediation and its predicate process, negotiation) that itself comports with the substantive principles of fairness; and it must establish procedural guidelines that focus not on efficiency standards as the defining features of the process but rather on those elements of a conversational exchange that secure and ensure dignity and respect. Such a two-prong purpose clause will operate effectively in the real world—that is, ensure that mediation is not a sham camouflage for systematically reinforcing power disparities—only if the visions of the predicate process embraces features consistent with the governing conception of fairness. It is to a consideration of what assumptions statutes make about that predicate process—bargaining—to which we now turn.

B. Theories of Bargaining

Bargaining literature suggests that there are two primary orientations for negotiating: competitive and principled. The literature often characterizes this contrast as adversarial versus problem-solving orientations. For discussion purposes, the salient point to note is that writers and practitioners frequently attach a normative judgment to the desirability of these orientations. The presumption of competitive bargaining is that the process operates to constrain the otherwise unfettered maximization of self-interest; its language suggests that parties must compromise to reach acceptable, even if not optimal, solutions. Those advocating the problem-solving orientation, by contrast, insist that its approach engages the imagination of the parties in such

³⁶ See *G. Heileman Brewing v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989).

a manner as to promote dialogue and brainstorming so that parties expand the domain of settlement options. Rather than feeling compelled to accept a "half-a-loaf" settlement, problem-solving proponents argue that their approach enables persons to promote wiser outcomes in a more efficient manner without damaging the relationship among the parties.³⁷ On these criteria, they argue, principled bargaining should be the preferred orientation.

Because mediation is predicated on the negotiation process, often being referred to simply as "assisted negotiations," a uniform mediation statute could endorse or embrace either orientation to bargaining; the orientation it supports carries implications for mediator behavior and duties. Not surprisingly, the adopted orientation has implications for fairness considerations. It is easier to discern how statutes embrace a bargaining theory—or try to twitch it—by examining briefly the type of situation that would be, and should be, of concern to anyone drafting a mediation statute.

Bargaining is predicated on power relationships among participants.³⁸ Power is relevant to the party's capacity not only to propose or impose settlement terms, but also, and more important, to establish what items are to be bargained and in what sequence they will be discussed. To discuss a power relationship immediately raises concerns about balance, equality and protection. What is unnerving about the image of independent, autonomous individuals bargaining about their outcome is our warranted skepticism that autonomy might be an illusion. Historical examples abound. Minor children who are starving and thereby agree to work a sixty-hour week at subsistence wages do not meet the paradigmatic image of independent, autonomous agents engaging in a discussion to strike a bargain over terms of their employment relationship. Similarly, adults who operate in bargaining situations at disadvantages of wealth, linguistic skill, information or visions of the possibilities will always lose to their bargaining counterparts.³⁹ That is,

³⁷ The most familiar account of these orientations to bargaining is set forth in the immensely popular and influential book, *Getting to Yes*. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES* (1981). Its vocabulary has been incorporated into a wide range of bargaining contexts. The Federal Mediation and Conciliation Service promotes "interest-based bargaining." For a typical critique and alternative perspective, see DANIEL A. LAX & JAMES K. SEBANIUS, *THE MANAGER AS NEGOTIATOR* (1986). The seminal treatment of adversarial bargaining techniques and analytical framework remains RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (1965).

³⁸ See generally SAMUEL B. BACHARACH & EDWARD J. LAWLER, *POWER AND POLITICS IN ORGANIZATIONS* (1980).

³⁹ Cf. JON ELSTER, *SOUR GRAPES* (1983).

their posture and skills expose them to the real possibility that via the bargaining process, they will substantively be worse off after the bargain than they were before discussion started. That is, the outcome would violate the substantive fairness principle. Such persons do not need to be placed in a bargaining room with their counterpart and advised to exercise their freedom; rather, they need the support of advocates who marshal substantial political and social capital to create by legislation those conditions that minimize inequalities or afford a safety net of economic and social benefits. All that is proper.

Bargaining does assume autonomy. Why promote it? An appropriate analysis requires a substantial investigation of the principles of political theory ingredient to a constitutional democracy. But a quick glimpse of its value can be gleaned from the following observations: The pervasive power of contract among persons or businesses is acclaimed not simply as an efficient economic device but as a framework for moral interaction among persons who have a right to be treated with equal dignity and respect. Those supporting the process of collective bargaining in the United States extol it as a vehicle that respects the capacity of individuals, through their group spokesperson, to identify concerns of significance, to articulate their relevance and to persuade others to respond or honor their need. And one dimension of the collapse of the former Soviet Union was the motivating passion of solidarity to assert that an individual should be able to participate meaningfully in shaping the conditions, working and otherwise, that define his existence.

So, there is an understandable clash or tension. Some persons⁴⁰ view aspects of the world as needing “corrective alignment” and pass laws to establish various entitlements and protections to ensure that those rights are secured; the expectation and hope of those persons is to make certain that persons operating in the shadow of such legislatively or judicially created rights are not at liberty to ignore those entitlement claims or undermine the obligations that issue from such guidelines because the dispute resolution processes they deploy enable them to do so. Others endorse using a dispute resolution process—bargaining—in which parties, by their own choice, are free to incorporate a variety of norms into their decisionmaking process and retain the freedom to establish and resolve matters through their assessment

⁴⁰ And clearly it could be that all persons at some time believe in the need for collective “correction” or affirmative action to shape desirable social and civic conditions. That is, it is not simply those characterized as “social reformers” who seek to use the processes of legislation to promote particular ends; persons at all ends of the political spectrum use the processes as they see it relevant to their needs.

of how all interests, both legal and non-legal, should issue in a schedule of priorities. This tension is revealed in how statutory drafters and commentators define the bargaining process or the mediator's role in it.⁴¹ Those who view bargaining as principled reveal a statutory orientation that presumes safety nets in the sense that there is confidence that nothing untoward or unjust can be expected to happen.⁴² By contrast, those advocating a competitive bargaining theory would embrace the definition of bargaining set forth in the National Labor Relations Act:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . *but such obligation does not compel either party to agree to a proposal or require the making of a concession.*⁴³

These competing bargaining orientations stereotypically possess the following features: principled bargaining will be friendly (gentler), oriented towards problem-solving (non-adversarial) and collaborative (informal); that is, it will consist of a series of discussions in which dialogue occurs among persons of good will who share information in an informal manner with the goal of exploring how mutual or dovetailing interests can be satisfied. Competitive bargaining, on the other hand, embraces a conception of bargaining captured in the metaphor of the "level playing field." As long as everyone is in the same stadium, on the same field and playing according to the same rules, bargainers are at liberty to establish their preferred outcomes. To continue the sports metaphor, if the "final

⁴¹ Those who view the process as competitive fear that power disparities might cripple parties from securing legal entitlements, so they are motivated to include complementary provisions to ensure legal justice. Examples of such statutory provisions appear *supra* at note 21 and note 22.

⁴² See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1551 (1991) ("Mediation fails to fulfill its promise to be a *gentler* alternative to the adversarial system.") (emphasis added); *see also* CAL. EDUC. CODE § 56500.3 (West Supp. 1998) ("It is the intent of the Legislature that . . . these [special education] voluntary prehearing request mediation conferences be an *informal* process conducted in a *nonadversarial* atmosphere.") (emphasis added); FLA. STAT. ANN. § 44.1011 (2) (West 1995) ("Mediation is an *informal* and *nonadversarial* process . . .") (emphasis added).

⁴³ National Labor Relations Act, § 158(d), 29 U.S.C. §§ 151-169 (1982) (emphasis added).

score” of the game is 81-0, then, in the eye of the competitive bargainer, nothing perverse, untoward or unfair has occurred.

Before examining the implications of a particular bargaining perspective on fairness considerations, one must analyze the consequences that a particular bargaining theory carries for mediator conduct. The following statutory excerpts illustrate the impact on mediator performance that follows from a particular orientation toward bargaining.

C. Mediator’s Duties to Facilitate Bargaining

Some statutory provisions regulating mediator conduct explicitly reject the competitive bargaining approach. A California statute, for example, provides:

Mediation of cases involving custody and visitation concerning children shall be governed by uniform standards of practice adopted by the Judicial Council. *The standards of practice shall include, but not be limited to, all of the following . . . the conducting of negotiations in such a way as to equalize power relationships between the parties.*⁴⁴

The statute prescribes that a mediator not remain impartial in his efforts to conduct the conversation so as to establish a balance of power; the analogous outcome of an 81-0 score would not be permitted under this framework. Thus, if there is to be any negotiated agreement at all under the California statute, the more powerful party will be required in some important way not only to recognize the interests of their bargaining counterpart but, quite tangibly, agree to arrangements that affirmatively move toward satisfying them. It is easy to understand, though not endorse, why some parties, namely, the more powerful ones, resist the notion of participating in mediation.

Similarly, Florida provides that “[a] mediator shall assist the parties in reaching an *informed* and voluntary settlement.”⁴⁵ This places an affirmative duty on the mediator to prohibit competitive tactics that utilize nondisclosure of pertinent information to frame the party’s decisionmaking perspective. A contrary theme regarding which bargaining theory to incorporate into the mediation framework is sounded elsewhere. Iowa and Minnesota are illustrative:

⁴⁴ CAL. FAM. CODE § 3162(b)(3) (West Supp. 1998) (emphasis added).

⁴⁵ FLA. STAT. ANN. § 10.060(a) (West 1997) (emphasis added).

Iowa

1. The farm mediation service, with the assistance of knowledgeable persons, shall provide a program to train mediators to assist in the mediation of nuisance disputes.

2. At the initial mediation meeting and subsequent meetings, the mediator shall:

- a. Listen to all involved parties.
- b. Attempt to mediate between all involved parties.
- c. Encourage *compromise* and workable solutions.⁴⁶

Minnesota

The effect of a mediated settlement agreement shall be determined under principles of law applicable to contract. *A mediated settlement agreement is not binding unless it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights.*⁴⁷

As these provisions reflect, the vocabulary of “compromise” is ingredient to the competitive bargaining framework. The mediator’s duty is to persuade or encourage people to adjust their proposals and differences in order to promote settlement, even if those compromises do not promote one’s more fundamental interests. Minnesota’s provision is more explicit: the mediator has no business trying to equalize power relationships or ensuring that proposed settlement outcomes are compatible with, much less required by, legal rights and obligations. Parties are free—autonomous—to strike their own deals shaped by whatever combination of sources of rules and principles they find persuasive, be they religious, moral, economic, psychological or legal.

If one accepts the notion that there are two distinctive visions of bargaining, it becomes evident that the decision to embrace one framework allows for certain types of party and mediator behavior while proscribing others. To engage in problem-solving bargaining is to reject the notion of compromise. To presume that it is the mediator’s duty to equalize the

⁴⁶ IOWA CODE ANN. § 654B.5 (West 1995) (emphasis added).

⁴⁷ MINN. STAT. ANN. § 572.35(1) (West 1988)(emphasis added).

bargaining relationship is incompatible with the conception that bargaining does not require either party (however powerful one might be) to agree to a proposal or make a concession. To ensure that party's decision is informed eliminates or minimizes whatever competitive advantage one party might obtain by strategically withholding certain information during the bargaining process.

Two related components of the bargaining process are frequently regulated by statute and their impact must also be assessed against fairness standards. These elements are the topics deemed eligible for bargaining, and the timing or sequence in which eligible bargaining topics must be discussed and resolved.

1. *Scope of Issues*

a. California Family Code

An agreement reached by the parties as a result of mediation shall be limited as follows: (a) where mediation is required to settle a contested issue of custody or visitation, *the agreement shall be limited to the resolution of issues relating to parenting plans, custody, visitation or a combination of these issues.*⁴⁸

Where it appears from a party's application for an order under this chapter or otherwise in the proceedings that the custody of, or visitation with, a minor child is contested, the court shall set those issues for mediation pursuant to Section 3170. The pendency of the mediation proceedings shall not delay a hearing on any other matter for which a temporary order is required, including child support, and a separate hearing, if required, shall be scheduled respecting the custody and visitation issues following mediation in accordance with Section 3170. However, the court may grant a continuance for good cause shown.⁴⁹

b. National Labor Relations Act

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to *wages, hours, and other terms*

⁴⁸ CAL. FAM. CODE § 3178 (West 1994) (emphasis added).

⁴⁹ CAL. FAM. CODE § 20019 (West 1994).

*and conditions of employment.*⁵⁰

c. Indiana Agricultural Debt Mediation

[T]he Commissioner . . . must establish (a program [mediation program] which has) reasonable procedures to encourage a financially troubled farmer . . . and each creditor of the financially troubled farmer to participate in efforts to *restructure the farmer's loans*.⁵¹

2. Sequence and Timing

a. Texas

It is the policy of this state to encourage . . . *the early settlement of pending litigation through voluntary settlement procedures*.⁵²

b. New Jersey

The Legislature declares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and *not litigation*.⁵³

c. California

In any proceeding where there is at issue the custody of or visitation with a minor child, and where it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both such issues are contested, as provided in Section 4600, 4600.1, or 4601, the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing.⁵⁴

How is a statutorily prescribed agenda and mandated bargaining sequence

⁵⁰ See 29 U.S.C. §§ 141-197 (emphasis added).

⁵¹ IND. CODE § 15-7-6-10 (emphasis added).

⁵² TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (West 1997) (emphasis added).

⁵³ N.J. STAT. ANN. § 52:27D-316 (West 1986). Parties must go through mediation/review process for six months before entitled to litigation. See N.J. STAT. ANN. § 52:27D-303 (West 1986) (emphasis added).

⁵⁴ CAL. FAM. CODE § 4607(a) (West 1994).

congruent with a bargaining orientation and, by implication, party bargaining tactics and mediator behavior? The answer appears to be straightforward: The more limited the range of bargaining topics and the more rigid the required bargaining sequence, the more likely the parties will adopt a competitive-bargaining orientation. In the employment sector, if management and union need only discuss “mandatory subjects of bargaining,”⁵⁵ then opportunities for (creative) problem-solving tied to interest-based considerations are severely constrained. In the family area, requiring parties to discuss only parenting arrangements before any other economic matters can be bargained limits the range of possible and imaginative arrangements. To insist that bargaining (and mediation) must occur *before* any other process can commence constrains the parties’ ability to utilize multiple dispute resolution fora as a bargaining strategy.

How, then, do these statutory provisions affect the relationship between the bargaining process and fair procedures and outcomes. The provisions regulating party negotiation in custody and visitation controversies sharply reflect the combined impact of structuring the sequences of process use with a restricted domain of application. Succinctly, many statutes require that in a contested divorce proceeding, parties must first try mediation of parenting issues only (custody and visitation) before they are permitted (in a nonmediated session) to consider economic issues. These statutes attempt to preclude a presumptively wicked, powerful spouse from using unfair bargaining tactics, predicated on power disparities, to achieve unfair outcomes.⁵⁶ Without denigrating the source of that concern, there can be no question but that the statutory framework imposes a rigidity on the bargaining process that might otherwise permit independent bargainers to create outcomes that better satisfy the interests of all.

To make these observations regarding mandatory bargaining agenda and

⁵⁵ NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958) (confirming the distinction between mandatory, permissive and illegal subjects of bargaining in private sector labor-management relations).

⁵⁶ The situation which one seeks to avoid is presumptively the following: prohibit an individual (almost always, the alleged perpetrator is the financially secure, selfish husband) from linking economic considerations regarding spousal support and property distribution from concerns about parenting. The oft-feared demand (or, more accurately, “bargaining play” or ruse) of the husband making an initial demand for exclusive custody of the children with no opportunity for visitation in exchange for modest financial support must then be met with the (female) spouse’s response (or, plea) for complete custody and “minimal financial” support; presumptively, these “games” are prohibited by these statutory rules for sequencing.

sequencing is not to deny that important policy reasons can be marshalled to support such statutory requirements. For example, to limit bargaining to prescribed topics satisfies components of due process: it focuses discussion, reduces the potential surprise one party might otherwise experience at a mediation conference and ensures that one's ability to surface and share relevant information on the stated topics is protected. Further, mandating that some topics cannot be ignored by one or more parties supports at least one party's ability to get the matter on the table; having such a requirement renders irrelevant the fact that one party might not want to entertain or discuss a proposal on that matter.

But there are important drawbacks to bargaining behavior and strategy that attend the policy decision to restrict these features of bargaining behavior. The converse of identifying matters that must be discussed is that those matters not identified as required topics are deemed "discretionary."⁵⁷ That is, if matters other than those licensed by the statute are raised, the receiving party is legally entitled to refuse to consider or discuss them. But the conventional wisdom about bargaining and mediation is that part of its strength lies just in its potential for identifying sharply a range of concerns that are either only tangentially addressed by the stated legal causes of action or are ignored altogether;⁵⁸ to authorize one party to refuse to discuss some topics (as contrasted with being persuaded to discuss them) undermines the potential for advancing pareto optimal outcomes, or outcomes that violate the difference principle of fairness. Recently discussed cases involving litigation over constitutional issues sharply reveal how parties' lawyers' attempts to limit the domain of topics to targeted issues (i.e., legal causes of action)

⁵⁷ This precise terminology is operative in the labor-management arena, both private and public sectors, in which the concepts of "mandatory" and "non-mandatory" (or "discretionary") topics of bargaining focus the discussions. A non-mandatory bargaining topic—for example, tuition reimbursement for employees taking non-job-related courses at a local high school, community college or four-year institution—is one for which a union might make a proposal but the employer is free either to discuss it or to refuse to talk about it all; if the latter position obtains, then the union representative is foreclosed from discussing it further. Obviously, serious debate and controversy erupt over defining what is a "wage, hour or other term and condition of employment" (mandatory subjects of bargaining) and what are discretionary issues. Whether the decision to close a plant is a mandatory subject is an example of an issue that matters.

⁵⁸ For a related discussion of the importance of permitting such a voice as part of a democratic society, see JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* (1990).

impoverishes the bargaining potential of the parties.⁵⁹

It is helpful to summarize these observations about bargaining theory and fairness before proceeding to the final element of analysis. First, some current statutory provisions regulate the bargaining process so as to preclude the parties from agreeing to certain outcomes. Second, some attempt to ensure that disparate, mismatched resources do not figure decisively in the dispute resolution process—that they are in some important sense neutralized. Finally, some statutes prohibit the parties from discussing or resolving certain topics before other matters are settled.

Each such provision (singularly or in combination) operates to constrain participation and choice.⁶⁰ They share the characteristic that each propels parties to shape bargaining outcomes according to claims of legal justice.⁶¹ While there may be nothing inappropriate about that, it also means that fairness might have been compromised.

The final consideration is now in order. If the mediation process is predicated on the bargaining process—i.e., mediation is a procedure for assisting parties to reach a negotiated outcome—then the nature of the mediator's role must be appropriately described (or assumed) in relevant legislation and rules. Once that is crystallized, the impact of the mediator's role on fairness can then fall into relief.

D. A Theory of Mediation

Statutory provisions embrace competing visions of the form in which the mediation process operates; given the form, mediator behaviors and duties follow.

⁵⁹ See Love & McDonald, *supra* note 36, at 8–10.

⁶⁰ One must assume that a participant always has the right to refuse to accept a proposal—concerns about “pressure to settle” are clearly important and legitimate ones but speak to a different concern.

⁶¹ Clearly much more needs to be analyzed in this regard, but the structure of the analysis is the following: If a statute requires a certain type of substantive outcome, then how one reaches that outcome—via a competitive or problem-solving orientation—becomes constrained. In general, the more limited the potential dialogue and options, the more competitive the orientation tends to be. The less structured or constrained the dispute's definition, the more potential exists for adopting a problem-solving orientation. It is important to note that a problem-solving orientation does not—and should not—eliminate a party's desire to promote self-interest, be selfish or greedy.

1. *Form*

Most persons envision mediation as an interactive process in which parties, with a mediator's assistance, explore settlement possibilities. A useful example is contained in California's definition: "'Mediation' means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement."⁶² But some jurisdictions portray it differently, especially in designated contexts:

Florida: Campus Master Plans and Campus Development Agreements.

Disputes that arise in the implementation of an executed campus development agreement must be resolved as follows: (a) Each party shall select one mediator and notify the other in writing of the selection; within 15 days after selection, the two *party-selected mediators* shall select a *neutral, third mediator*" (d) Within 60 days after the convening of the panel, the *panel shall issue a report containing a recommended resolution of the issues in dispute.*⁶³

Indiana:

Whenever a dispute arises between the users of surface water in a watershed area, any party . . . may request that the natural resource commission mediate the dispute . . . Upon receipt of such request, the commission shall conduct a hearing. The commission is authorized to make a survey of the water supply in the watershed involved and to endeavor to add additional sources of water for users in such watershed. Any recommendation of the commission in any such mediation proceeding shall not be binding upon the parties.⁶⁴

Ohio:

The director of mental health . . . shall: [r]eview each board's plan submitted . . . and approve or disapprove it in whole or in part. . . . If the approval of a plan remains in dispute thirty days prior to the conclusion of the fiscal year . . . the board or the director may request that the dispute be submitted to a mutually agreed upon third-party mediator. The mediator shall issue to the board and the department recommendations for resolution of the dispute.⁶⁵

⁶² CAL. CIV. PRO. CODE § 1775.1(a)(2) (West 1998).

⁶³ FLA. STAT. ANN. § 240.155 (17)(a), (d) (West 1994) (emphasis added).

⁶⁴ IND. CODE § 14-25-1-8 (1997).

⁶⁵ OHIO REV. CODE. ANN. § 5119.61 (Banks-Baldwin 1997).

These latter provisions import into the mediation process an adversarial hearing procedure that differs sharply in both theory and tactics from the bargaining process. Unlike the vision of mediation contained in the California definition, the hearing process prescribed by these latter statutes are more akin to versions of arbitration than mediation. The theatre of a process in which the parties select their mediators, present their case to the panel, and thereafter receive the panel's nonbinding recommendations for disposition of the matter compels participants to present their case to a decisionmaker for judgment rather than to engage in an interactive exchange of bargaining proposals designed to explore settlement options acceptable to all. This mediation is nothing more than a dress rehearsal for trial. The Indiana statutory provision went one step further: it licensed the mediator to provide tangible resources directly or indirectly to the parties in order to resolve the controversy. While that mandate might be understandable from the perspective of enabling a government agency to effectively administer and implement its statutory mandate, it also licensed mediator behavior that most ethical codes proscribe as singularly inappropriate because it undermines the notion of the mediator operating as a neutral intervener.⁶⁶

Recent attention has focused on, and in some quarters endorsed, the practice of "evaluative mediation."⁶⁷ Such mediation, it is claimed, licenses the mediator to utilize the following strategies to get the parties to settle their case: "Predict impact . . . of not settling; develop and offer . . . [settlement] proposals; and urge the parties to accept the mediator's proposal."⁶⁸ Finally, "[i]f the mediator has clout [the ability to bring pressure to bear on one or more of the parties], she might . . . threaten to use it."⁶⁹ The clothes might

⁶⁶ Tangibly, there is no need for an intervener to be impartial if he has access to resources that could resolve a dispute (e.g., if a person "assisting" an injured party and an insurance company bargain over compensation for injuries and the plaintiff's offer exceeded the defendant's offer by \$50,000, there certainly is nothing wrong with an intervener proffering the \$50,000 difference from his or her own pocket to settle the matter). Most practitioners not only do not have the resources to facilitate settlements in such a matter but view it as a violation of their ethical code of conduct to operate in such a fashion.

⁶⁷ See James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985 (1997).

⁶⁸ SHKLAR, *supra* note 58, at 31.

⁶⁹ *Id.*

have changed but the reality is that the person performing as an evaluative mediator has significantly transformed the process from that of assisted negotiations to a procedure that bears a striking resemblance to an adjudicatory framework. That shift significantly constrains how parties can or cannot bargain. From the perspective of fairness, it vitiates its central substantive dimension: fair procedures assume (1) starting points in which parties possess the autonomy to explore settlement arrangements, (2) the liberty to strike deals which maximize their freedom of operation consistent with a like liberty for all and (3) outcomes that do not put one party in a notably worse-off situation than his original starting position. Evaluative mediators are not constrained by any of those features. Even if, accidentally or intentionally, evaluator mediators steered, cajoled or directed parties to agree to settlement terms that were consistent with the requirements of (2) and (3), such an approach systematically violates (1). Similarly, the evaluative orientation, charitably speaking, provides only minimal respect to procedural fairness concerns.

Thus, to secure a vision of the mediation process that is consistent with fairness principles, a uniform statute must embrace an approach similar to that reflected in the California provision, whereby persons treat with integrity the concepts of facilitating communication and assisting disputants to reach a mutually acceptable agreement. If that is done, then certain types of mediator obligations follow.

2. Mediator Duties

Two statutory provisions regarding mediator duties illustrate process elements that raise policy and fairness concerns:

1. "A mediator shall assist the parties in reaching an *informed* and voluntary agreement."⁷⁰
2. "A mediator *shall* . . . ensure that the parties consider fully the best interests of the children"⁷¹

While the motivation for these provisions is understandable, it is misplaced. The Florida provision tries to ensure that parties do not reach agreements ignorant of their legal rights while the Kansas provision wants to make certain that the interests of some primary stakeholders are not

⁷⁰ FLA. R. 10.060 (1995) (emphasis added).

⁷¹ KAN. STAT. ANN. § 23-603 (1996) (emphasis added).

inadvertently or deliberately neglected by the named parties to the controversy who possess exclusive authority to establish settlement terms. Neither statutory provision, however, can survive considerations of fairness principles. Consider the Kansas provision first.

To support an interpretation that the law requires a certain substantive outcome, one must interpret the Kansas provision as requiring the mediator to ensure that the best interests of the child take priority among the settlement terms. That strong interpretation does not seem warranted, for the statutory language appears to mandate only that the mediator make the parties *consider* information pertinent to that standard. The weak interpretation, conversely, seems to require only that the parties consider, or take note of, the best interests of the children when developing their settlement terms, even if the terms of the final negotiated agreement systemically vitiate that standard. But this interpretation appears implausible in light of the goals the statute is attempting to promote. The most coherent interpretation and application of the statutory provision, then, appears to be the following: the mediator must compel the parties not only to consider fully the best interests of the child but to somehow incorporate those interests into tangible settlement terms in a way that does not place them at the lowest priority level. If that is the mediator's duty, though, then the mediator confronts the same difficulty, on fairness considerations, that attended those statutory provisions that require particular bargaining outcomes: namely it only ensures consideration of legal justice outcomes, not necessarily fair outcomes. But there is a more important, instructive lesson to glean from another aspect of this provision.

The mediator has a duty to ensure that the parties consider fully the best interests of the children. How would one assess whether the mediator complied with this requirement? A court reviewing the parties' proposed settlement terms might believe that the arrangements, *prima facie*, ignored the children's best interests and compel the parties and their advocates to explain and justify the proposed settlement. Alternatively, one party might try to contest court approval of the agreement by claiming that at no time did the parties consider (or the mediator make them do so) matters relevant to the mediator's statutory duty. More seriously, how would one demonstrate that the mediator had the parties consider fully the children's best interests? Does fully mean every possible option? How do resource constraints affect the capacity of the parties to comply with this mandate? If the settlement terms were *prima facie* plausible, what could the reviewing judge demand in the way of information to make certain that full consideration had been given to possible options?

The sentiment driving this provision is the notion of informed

decisionmaking. The goal is to make certain that participants do not prematurely foreclose possibilities and options or, in this instance, weigh more heavily their own interests against those of others who will be directly affected by their decision. No one wants to applaud or endorse autonomy when it is exercised in the throes of ignorance. But if a fully considered decision can be confirmed only by the presence or absence of certain types of settlement terms in the final arrangement, then not only are the statutory framers reintroducing required substantive settlement terms into the bargaining and mediation process but also they are positing a mediator duty that is conceptually impossible to fulfill and embraces a vision of mediation that is at odds with fairness principles. The Florida statutory provision raises these latter dangers directly.

The Florida provision must be interpreted as requiring the mediator to block any agreement that is not informed. How the mediator is to do this is left open, so a mediator could: (1) if consistent with other provisions of the ethical code, provide relevant information to one or both parties and then let them decide whether or not to settle the matter; or (2) terminate the mediation session with the admonition to parties to investigate the proposed arrangements with other individuals (e.g., counsel) in order to make certain that the proposed provisions are what they wish to embrace.⁷² The concern about informed settlement is routinely cited in the context of whether a party is aware of his legal rights. Presumably under the Florida provision, all that informed means is that the party is aware of how his legal rights might inform or be affected by the proposed settlement terms. The concern and passion for a party's well-being that animates the demand for informed settlement noticeably does not extend to requiring the mediator to ensure the parties' informed assessment of the proposed settlement terms on their economic, psychological, metaphysical, ethical or political rights or interests.⁷³ Given the context of how the claims originate and cases ultimately

⁷² For a thoughtful discussion of the challenges ingredient to mediator tactics in making certain that parties are informed of their legal rights, see Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 92-115.

⁷³ In the same way in which a mediator might terminate the hearing to encourage parties to consult with legal counsel, they do not terminate the hearing to make certain that the parties consult with their financial investment advisor, religious counselor or other mentors or resources to whom individuals frequently turn for advice. There is a natural and appropriate concern that if lawyers or mediators were to explore these types of matters, they would be moving into areas of knowledge for which they do not possess particular expertise. Further, they would be expanding the range of discussion topics

find their way to mediation, that is understandable. But the question is whether fairness is secured by insisting that the mediator has a duty to ensure informed decisions. The answer is straightforward: of course not. All this “informed” requirement accomplishes is to reintroduce, via a mediator’s duty, the requirement that one considers one’s legal rights before agreeing to any outcome. But this simply posits the concept of fairness as being legal fairness; the right, for instance, to be treated with dignity and respect that was posited as a component of fairness might be trumped by the mere assertion of one’s legal right.⁷⁴

But something in this analysis seems to have gone askew. Surely, the sentiment for wanting decisions to be informed is laudable; it is not a desirable state of affairs for decisions, whatever their context, to be made in ignorance. Similarly, mediation proponents do not want to be labeled as advocating a “know-nothing” approach to bargaining and decisionmaking. Why, then, should statutory efforts to ensure intelligent decisionmaking in the mediation process be subject to attack? What has malfunctioned?

beyond any type of defined or focused agenda. All that might be accurate; it fails, however, to answer the question of why a mediator should restrict her concern about ensuring informed agreement only to an awareness of a party’s legal rights, unless one simply presumes without argument that for a lawsuit to be mediated, the only rights or interests relevant to the discussion are legal ones. The weakness of that response is that it simply presumes without argument a vision of mediation as being appropriately dominated by, if not exclusively focused on, an analysis and consideration of legal issues. It further presumes that in every lawsuit, each party and her lawyer always comprehensively identify all relevant legal theories of actions and appropriate theories of relief and that a mediator must ensure that that is obtained. Even this requirement, though, might compel parties to investigate their claims and that might exceed their resource capacity, need or interest.

⁷⁴ I am not suggesting that one should prohibit a person from filing a legal claim. The sentiment designed to be captured here is a sensitivity to how the simple assertion of a legal claim might itself violate fairness considerations. Therefore, if a mediator *must* make people aware of or assert their legal rights, then he or she might not be promoting fairness in so doing. Assume a situation in which one party with remarkably vast resources files a legal claim for rent arrears and repossession of an apartment to which she is entitled. The mere assertion of the claim demolishes the fragile spirit and self-esteem of the frail, destitute, elderly, widowed tenant as well as dramatically intensifies her psychological stress for fear of losing all of her life’s possessions in order to pay off the debt arrears. The sentiment noted here simply is that, in an important moral sense, it could be argued that the landlord’s asserting the claim is a thoughtless, mean and in an important sense, unfair thing for that person to do. The conventional cry would be: “You just shouldn’t do it.” Clearly, though, the landlord is within her legal rights to do so.

The problem develops because those wanting to ensure informed consent typically use as their examples those situations in which the less powerful party appears to be willing to agree to an outcome that public policy, through its statutes, has deemed improper.⁷⁵ Although any individual might agree to work for wages at less than the minimum wage scale, why laud that as an exercise of autonomy when the policy decision has been made that persons engaged in business and employ others must compensate those persons at a prescribed minimum rate? The appeal of the example⁷⁶ flows from the fact that legislators or jurists have developed specific responses to redress those inequities. To thereafter embrace a bargaining or mediation process that does not compel parties to abide by, or at least consider, those legal entitlements and duties appears to simply reward some parties—the most powerful ones—to evade the very laws that were developed in response to their belligerent or selfish behavior.⁷⁷ But such examples and cries provide only part of the actual story. A simple hypothetical illustrates another.

Presume Jones and Day meet one another on the street; Day verbally abuses Jones and physically assaults him. Jones is shaken but not physically harmed; nevertheless, wanting protection against future attacks, he files a criminal complaint against Day. The case, as often happens, is referred to mediation. During the course of the mediation conference, the mediator learns that Day was a former employee of Jones. Jones had fired him and Day had been without steady employment since that date. As the discussion developed, Day shared information with Jones that made out a basic claim for a termination in violation of both federal and state antidiscrimination laws. Jones, learning of these allegations for the first time and becoming visibly uncomfortable at the possibility of litigation on these matters, initiates conversation with Day about his returning to work for Jones. After three hours of discussion in mediation, the parties are discussing the following elements of a settlement: entry into a company job training program which, upon successful completion, would result in Day's being assigned to a different department from the one in which he was last employed and at a higher pay grade; payment of a stipulated sum to cover lost wages and

⁷⁵ See SHKLAR, *supra* note 58, at 55–57.

⁷⁶ A host of other examples can quickly be constructed involving the same analytical structure: parties with severely disproportionate resources bargaining over matters that had been presumptively altered via legislation and resulting in the parties reaching settlement terms that reflect precisely the condition that the statutory provision was designed to deter.

⁷⁷ This is the basic argument of Owen Fiss in his widely cited article *Against Settlement*. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

benefits; and a plan for announcing this settlement to the public and company personnel that is designed to save face for both Jones and Day.⁷⁸

Before the parties reach closure on these terms, the mediator asks to meet again with each party in caucus. When talking privately, Jones makes it very clear to the mediator that the compelling motivation for his pursuing these discussions and entertaining this settlement proposal was his fear of potential adverse publicity, cost and, ultimately, liability in an antidiscrimination lawsuit. The mediator, with the prospect of the agreement looming before the parties, suddenly realizes that the statute of limitations for Day's claim against Jones has expired; Jones is completely protected—his concerns about being vulnerable in a discrimination lawsuit filed by Day are misplaced, for Day cannot legally prevail. If this case operated under Florida law, must the mediator inform Jones of that fact so that Jones can make an informed decision? If the proposed settlement might not be informed, arguably it should be stopped. Indeed, those who promote or endorse evaluative mediation should triumphantly note that the mediator would (or should) have raised the statute of limitation matter at the outset, thereby quickly short circuiting the hypothetical discussion from the outset.

Further, neither the Florida provision nor those like it distinguish between the situation in which parties are represented by counsel from those in which they appear *pro se*. In the above hypothetical, the mediator's duty should remain the same: if the mediator believes the party might be making a decision that is not informed, even if the party's legal representative has not brought this matter to his client's attention, the mediator should torpedo the discussion.

What this hypothetical exposes is that it is clearly possible that the party to the mediation session who is operating without full knowledge of his legal rights is also the person who enjoys decided advantages on every other dimension of their relationship: he is more powerful, resourceful, selfish and brutal. If the mediator is under a duty to ensure informed party decisionmaking, then the mediator's disclosure operates not to equalize a power relationship but to solidify the inequities. Such disclosure undermines fairness; it does so as well in the critics' examples.

The motivation to require informed decisionmaking in the more typical, distressing examples is to ensure that the social decisions captured in legal policy are enforced. Obviously, there is much to commend that and certainly nothing untoward about it. But to require that mediators ensure, rather than encourage or promote, informed decisionmaking is to improperly play upon

⁷⁸ The charges of assault and battery have long since given way to this more substantive discussion, as is typically the case in such mediation referrals.

the ambiguous concept of being informed. Epistemologically, advocates are improperly equating being informed with the notion of full information about legal rights and consequences. Simply stated, there are degrees of being informed. One can be more or less informed and still make reasonable judgments. Parents routinely—and daily—make parenting decisions that are variously informed by one's individual knowledge of the psychology of child development, group behavior and gender and racial differences among children; understandings about biological and physiological needs of children; convictions about moral and religious values, political principles; and by habits of one's own developed in childhood and over a lifetime. Are those decisions informed? The best one can venture to say is that some of those decisions are more informed and thoughtful than others. But, absent crossing a minimal threshold (such as parenting practices that endanger the physical well-being of the child), there is a broad latitude for persons to make decisions affecting one's own interests as well as others that are reasonable and rational. Further, advising or telling someone that they cannot settle because they are operating without sufficient information is a form of paternalism that is not only objectionable in theory but also impractical, for there is no conceptual principle that can terminate the search for additional data to make certain the decision is informed.

So, for the hypothetical involving Jones and Day, most proponents believe that mediation's breathtaking promise emerges precisely in situations such as that described above: parties have considered their interests, brainstormed both settlement and non-settlement options, evaluated and prioritized the competing claims and then exercised their freedom to strike a deal on terms they believe meet their considered interests. There was no coercion. No one was compelled to adopt particular settlement proposals. Their decisions were respectfully informed by a variety of considerations. All that one can say is that their decision was not fully or as fully informed as it might have been. But that can be said of any decision that we make. Bargaining and mediation accept that as a given and place weight and respect on the parties' capacity to articulate and advance their own interests. From a fairness perspective, neither party is worse off from their original positions.

Having posited this argument, there is reason to consider attempting to meet this concern about ensuring informed decision-making in a more concrete manner. The reality is that the expanded use of mediation is occurring in court-annexed contexts; it is both expected and valuable to have the dispute resolution process operate in a manner that is consistent with its defining democratic values and systematically weaves legal information into the decisionmaking process. The most straightforward resolution to such a

concern, though its practicality is suspect, is to require that each party to a mediation conference be represented by counsel. Assuming we operate with a more modest conception of informed decisionmaking that acknowledges that a person can make informed decisions with only some information, even if not all relevant information, then having parties represented by counsel creates the presumption that each person has access to a capable resource who can provide him with appropriate information. We avoid the dilemma of unequal quality of representation in the same manner that the traditional system does not feel plagued by it, namely by acknowledging that counsel can provide some, even if not complete, information.

While the practicality of implementing such a proposal must remain suspect, given that sustained efforts to provide legal representation to indigent citizens or others in need has not been successful, it is important to note two of its features: first, many parties in court-annexed or mandated civil mediation conferences are represented by counsel, so the statutory requirement for mediators to ensure informed choice is unnecessary and destructive. Second, it directly responds to and satisfies the fairness concern of all.

Oddly enough, though, some mediation statutes do not authorize or permit parties to be represented. Consider the following:

1. "Unless otherwise agreed to in writing by the parties, the parties' legal counsel shall not be present at any scheduled mediation sessions."⁷⁹

2. "The mediator has authority to exclude counsel from participation in the mediation proceedings"⁸⁰

The operative presumption of these provisions is that the presence of legal counsel is inconsistent with a conversational forum that is to be informal or nonadversarial. That presumption assumes a vision of lawyering that is at odds with much practice and theory. From the perspective of ensuring fairness, it is unwarranted because it presumes that a lawyer's distinctive role is to restrict conversation to legal arguments and to focus all efforts exclusively on either seeking full vindication of a client's legal rights or minimizing the need for her to comply with her legal duties.⁸¹ If that vision of

⁷⁹ OR. REV. STAT. § 36.195(1) (1996).

⁸⁰ CAL. FAM. CODE § 3182 (West 1998).

⁸¹ For a related discussion of the role of lawyers in mediation, and their impact on the process, see generally Craig A. McEwen et al., *Bring in the Lawyers: Challenging*

lawyering were accurate, then no lawsuit, with or without the assistance of a mediator, would settle. But the reality is the contrary, and a thoughtful mediation process should embrace it.

III. CONCLUSION: PROPOSED STATUTORY PROVISIONS TO ENSURE FAIRNESS

If the discussion above is persuasive, then a uniform mediation statute must feature the following principles to ensure that fairness principles among individuals are respected:

The Purpose Clause must promote a conception of negotiation and mediation that is consistent with the most robust possible conception of party choice and autonomy. It must feature and give support to a democratic decisionmaking process in which the role of the respective parties, representatives and interveners is delineated and structured to support it. Unlike some statutory provisions referenced above, a uniform statute should not incorporate any provision that is targeted to achieve particular substantive goals.

Consistent with establishing threshold conditions for the exercise of autonomy, the uniform statute could and should compel initial participation in mediation by appropriate stakeholders. In similar ways, the statute should target those matters that constitute threshold requirements for party engagement and the possibility of a constructive conversation.

To ensure substantive fairness, the statute cannot skew the bargaining process by restricting the issues parties are eligible to consider or by mandating their discussion sequence. The statute cannot require, in order to confirm good-faith participation, that parties must adjust their proposals in bargaining or mediation or forego other avenues to adjust concerns or advance their interests. To support these provisions, the statutory definition of mediation must rule out as possible any form of what has been referred to as evaluative mediation.

the Dominant Approaches to Ensuring Fairness in Divorce Mediation, 79 MINN. L. REV. 1317 (1995).

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The statute must display or assume that a mediator's duties focus on acting, and cultivating, party behaviors that ensure procedural fairness. To achieve that, the statute must define mediation so as to establish a conversational procedure in which fundamental elements of conversational dignity and respect are secured; to ensure that inequalities in advocacy skills, verbal and non-verbal party behaviors, and mediator biases have no room to flourish, the statute must not characterize the mediation process as informal or non-adversarial; and to ensure minimum levels of informed decisionmaking, the statute should minimally provide parties with a non-waivable right to counsel.

Mediation performed pursuant to such provisions should and would constitute a critical resource in the life of a free people.

